

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

May 10, 2017

Re: Letter on WC Docket No. 17-108, urging the “rollback” of the Open Internet Order

Dear Ms. Dortch:

The undersigned signatories – comprised of individuals from small Internet startups, Internet engineers and content providers – would like to applaud the FCC's present efforts to roll back the Open Internet Order (OIO). We have long-believed that the OIO's needless rules were primarily designed as a government-mandated handout / subsidy from ISPs to Silicon Valley, paying back a political favor, and nothing more. The Internet was not “broken” to justify such an arbitrary and deleterious policy shift from the previous light touch regulatory regime – the latter of which propelled massive private Internet investment and deployment, as well as generated incalculable pro-consumer and societal benefit. With the OIO's 19th Century utility regulations, however, the Obama-Wheeler Commission did in fact break the Internet ecosystem with its market-distorting, innovation-by-permission ISP licensing scheme. The public interest demands the arrest of the OIO's overreach, and a return to the light touch policy that grew the Internet.

To this end, as you collect input to inform your rollback plans, we would like to offer you our brief thoughts:

Point one: Repealing the Title II reclassification of ISPs is the right thing to do, and must proceed with all due speed. 19th Century railroad regulations, upon which these rules are built, are inapt for today's vibrant communications marketplace. In a practical sense, their confiscatory nature means policymakers, through prophylactic law, want fewer players to invest and innovate in core infrastructure. Such a policy stands in stark contrast to the Telecommunications Act of 1996, which instructs the FCC “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans...” Ultimately, Title II harms consumers and makes it more difficult to bring new communications services to all Americans. Quite simply, steam-engine law has no place guiding today's communications landscape.

Point two: One industry group (with whom you recently met) claims that the Internet industry is “uniform in its belief” that the present Net Neutrality laws should be kept intact, especially the ban on paid priority. This is patently false. Of course, the largest Silicon Valley players whom that association represents like the rules because they both subsidize the transmission of “their” content to consumers, as well as erect significant legal hurdles that protect their products and services from disruptive competition. Contrary to the assertions of that association, small startups want the flexibility to partner with ISPs in paid priority arrangements (or other forms of service differentiation) in order to get a leg up, or at least stay competitive with, their larger, well-heeled competitors. To their chagrin, however, this has been banned by the OIO. Consequently, the incumbent Silicon Valley behemoth wins. The little guy, well, not so much.

The concern over paid priority is particularly striking and odd. The use of reasonable differentiation in the marketplace, such as that seen in paid priority, reflects the history of American commerce; it is employed to deliver immense consumer benefit in every sector of our economy, including the old POTS world under Title II. By placing this pro-competitive tool off-limits, the prior Commission's OIO breaks not only with long-held FCC precedent, it parts company with free enterprise principles which have been proven to sustain sound economic growth and broad-based prosperity for all Americans.

Added to this, a ban on paid priority is a prior restraint, unreasonably interfering with the free speech and association rights of ISPs and their potential partners. It stops these arrangements in their tracks, preposterously claiming that paid priority speech partnerships are so dangerous and harmful to the public that they have to be outlawed – like a contract of adhesion, or for illegal criminal acts. Quite simply, however, the OIO's ban on paid priority stands the First Amendment on its head, wrongfully placing the Commission in the position of uber-censor and licenser of ISPs and their communications partners, shaping and controlling the content Americans receive from their providers. We do not read the First Amendment to allow or promote this type of authority. Communications companies, guided by the marketplace, are the only ones who should be empowered to make these communications / speech decisions, not Uncle Sam or his unelected proxies.

To this end, the FCC should eliminate, or significantly relax, its present Net Neutrality framework. Paid priority, and other forms of reasonable differentiation, must be allowed. The Commission should recognize that the evolution of technology, the existence of vibrant competition, the clear potential for new competition, the presence of active peer group policing and standards-setting, and the wide availability of consumer-oriented tools do a tremendous job of keeping the Internet “open” and growing for all Americans. Where real (not conjectured) consumer harm occurs, the FCC should work in an ex post fashion to address that, either with its extant authority, or with / aided by the FTC. In all, this light touch approach is what built the Internet. The Commission should return to this successful, pro-growth model.

Point three: Your work represents an important step in erasing much of the regulatory overreach of the prior Commission. In the long run, however, Congress will have to act to permanently address the harms caused by the OIO / Title II regulations, ending the Chevron-enabled policy ping-pong. We urge that your work go forward, and that with it you help Congress understand its responsibility in putting this nearly two-decade-long “debate” to rest.

Again, we applaud your hard work and resolve in helping to right U.S. broadband policy so that it more truly serves consumers, society and our overall prosperity. We stand ready to assist the FCC and Congress to make these important and necessary changes.

Respectfully submitted,

Daniel Berninger, Founder, Voice Communication Exchange Committee (VCXC)
Fred Campbell, Director, Tech Knowledge
Mike Wendy, Director, MediaFreedom